FILED
NOV 1 1993
OFFICE OF THE CLERK

No. 93-332

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

---

MICHIGAN MUNICIPAL COOPERATIVE GROUP and
THE STATE OF MICHIGAN,
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION and
MIDLAND COGENERATION VENTURE, L.P.,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for District of Columbia Circuit**

---

## RESPONDENT MIDLAND COGENERATION VENTURE'S BRIEF IN OPPOSITION

---

ARNOLD H. QUINT
LAURA M. WILSON
HUNTON & WILLIAMS
P.O. Box 19230
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 955-1500

THOMAS G. SLATER, JR.*
R. HEWITT PATE
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

## COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in affirming FERC's application of established standards governing utility participation in PURPA "qualifying facilities" to an optional recertification review of the particular written record below?

## LISTING OF AFFILIATES PURSUANT TO RULE 29.1

Pursuant to Rule 29.1, respondent Midland Cogeneration Venture Limited Partnership ("MCV") states that MCV is a limited partnership organized under the laws of the State of Michigan. The partners of MCV and their parent companies (where different) are listed below:

| PARTNER | PARENT COMPANY |
|---|---|
| CMS Midland, Inc. | CMS Energy Corporation |
| MEI Limited Partnership | ABB Energy Ventures Inc. |
| C-E Midland Energy, Inc. | ABB Energy Ventures Inc. |
| Source Midland Limited Partnership | Panhandle Eastern Corporation |
| Micogen Limited Partnership | Fluor Corporation |
| Coastal Midland, Inc. | The Coastal Corporation |
| Alanna Corporation | Alanna Holdings |
| The Dow Chemical Company | |

The following subsidiaries and affiliates of the parent companies of MCV partners have issued securities to the public:

CMS ENERGY CORPORATION

Consumers Power Company

PANHANDLE EASTERN CORPORATION

Texas Eastern Corporation
Texas Eastern Transmission Corporation
Panhandle Eastern Pipe Line Company
Trunkline Gas Company
Algonquin Gas Transmission Company

THE COASTAL CORPORATION

American Natural Resources Company
ANR Pipeline Company
Coastal Limited Ventures, Inc.
Colorado Interstate Gas Company

THE DOW CHEMICAL COMPANY

DesTec Energy, Inc.
Dow Corning Corporation
Marion Merrell Dow, Inc.

ABB, INC.

ABB Impell Corporation
ABB C-E Nuclear Power Inc.
ABB Phoenix Control Systems Inc.
ABB Transmission & Distribution Co. Inc.
ABB Process Automation Inc.
ABB Kent Taylor Inc.
ABB Lummus Crest Inc.
ABB Traction Inc.
ABB Flakt Inc.
Asea Brown Boveri Inc.
ABB Simcon Inc.
ABB Treasury Center [USA] Inc.
ABB Special Finance Inc.
ABB Finance Inc.
Combustion Engineering Inc.

By listing these subsidiaries and affiliates of parent companies, MCV does not intend to convey the impression that the companies listed are subsidiaries or affiliates of MCV or that they are subsidiaries or affiliates for any purpose other than this listing.

ABB Energy Ventures Inc. is a subsidiary of ABB, Inc., a subsidiary of ABB Asea Brown Boveri, Ltd., a foreign corporation.

TABLE OF CONTENTS


| | Page |
|---|---|
| COUNTERSTATEMENT OF QUESTION PRESENTED | i |
| LISTING OF AFFILIATES PURSUANT TO RULE 29.1 | ii |
| TABLE OF AUTHORITIES | vi |
| COUNTERSTATEMENT OF THE CASE | 1 |
| REASONS FOR DENYING THE WRIT | 10 |
| I. PETITIONERS' PROCEDURAL DEFAULTS AND RELIANCE UPON UNTIMELY NON-RECORD MATERIALS PRECLUDE A GRANT OF CERTIORARI | 11 |
| A. Petitioners Failed to Preserve Their Challenge to FERC's Regulation Allowing Utility Participation in QFs | 11 |
| B. The Petition Relies Upon Arguments and Factual Assertions that Were Excluded Due to Violation of a Jurisdictional Time Limit | 13 |
| II. THE COURT OF APPEALS' AFFIRMANCE OF FERC'S APPLICATION OF ITS REGULATORY STANDARDS TO PARTICULAR FACTS PRESENTS NO ISSUE MERITING REVIEW | 14 |
| A. The Orders Below Represent the Application of Established Standards to a Particular Record, Amply Supported by Substantial Evidence | 14 |
| B. None of Petitioners' Various Other Complaints About the Proceedings Below Warrants the Court's Review | 15 |
| CONCLUSION | 19 |

TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402 (1983) | 2, 3, 16, 18 |
| *Boston Gas Co.* v. *FERC*, 575 F.2d 975 (1st Cir. 1978) | 9 |
| *Consumers Power Co.* v. *Public Service Comm'n*, 189 Mich. App. 151, 472 N.W.2d 77 (1991), *appeal denied*, 439 Mich. 992, 479 N.W.2d 644 (1992), *amended*, 442 Mich. 909, 503 N.W.2d 446 (1993) | 3, 11 |
| *Department of Interior* v. *FERC*, 952 F.2d 538 (D.C. Cir. 1992) | 12 |
| *FERC* v. *Mississippi*, 456 U.S. 742 (1982) | 2 |
| *Louisiana Ass'n of Independent Producers and Royalty Owners* v. *FERC*, 958 F.2d 1101 (D.C. Cir. 1992) | 17 |
| *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130 (1992) | 11 |
| *Michigan Public Power Agency* v. *FERC*, 963 F.2d 1574 (D.C. Cir. 1992) | 11 |
| *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974) | 14 |
| *Municipal Electric Utilities Ass'n* v. *Power Authority of the State of New York*, 48 F.E.R.C. ¶ 61,124 *aff'd sub nom. Allegheny Electric Cooperative, Inc.* v. *FERC*, 922 F.2d 73 (2d Cir. 1990), *cert. denied*, 112 S. Ct. 55 (1991) | 10 |
| *Puerto Rico Electric Power Authority* v. *FERC*, 848 F.2d 243 (D.C. Cir. 1988) | 6 |
| *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111 (1962) | 17 |
| *Raton Gas Transmission Co.* v. *FERC*, 852 F.2d 612 (D.C. Cir. 1988) | 12 |
| *Sugarloaf Citizens Ass'n* v. *FERC*, 959 F.2d 508 (4th Cir. 1992) | 4 |
| *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951) | 14 |
| *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986) | 16 |
| *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) | 17 |

TABLE OF AUTHORITIES—Continued

Page

*Woolen Mills Assoc.* v. *FERC*, 917 F.2d 589 (D.C. Cir. 1990) ..... 17

Agency Decisions and Opinions

*CMS Midland, Inc.*, 38 F.E.R.C. ¶ 61,244 (1987) ..... 5
*Cogentrix of Mayaguez, Inc.*, 59 F.E.R.C. ¶ 61,392 (1992) ..... 17
*Columbia Gas Transmission Corp.*, 40 F.E.R.C. ¶ 61,195 (1987) ..... 9
*Dominion Resources, Inc.*, 43 F.E.R.C. ¶ 61,079 (1988) ..... 15
*KP Diversified Investors, Inc.*, 32 F.E.R.C. ¶ 61,013 (1985) ..... 15
MPSC, *Final Order in the Proceedings to Implement Provisions Set Forth in Title II, Section 210, of the Public Utility Regulatory Policies Act (PURPA) of 1978 re Cogeneration and Small Power Production*, No. U-6798, 48 P.U.R. 4th 465 (Aug. 27, 1982) ..... 16
*Sithe/Independence Power Partners, L.P.*, 61 F.E.R.C. ¶ 61,212 (1992) ..... 17
*Ultrapower 3*, 27 F.E.R.C. ¶ 61,094 (1984) ..... 15
*Wyoming Wind Power, Inc.*, 34 F.E.R.C. ¶ 61,152 (1986) ..... 17

Constitutional, Legislative, and Regulatory Materials

U.S. Const., Art. VI, cl. 2 ..... 16
Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117 (1978) ..... 1
16 U.S.C. § 796(18)(A) ..... 2
Federal Power Act (FPA), 16 U.S.C. § 796(18)(B) (1988) ..... 1, 3, 11
16 U.S.C. § 796(18)(B)(i) ..... 16
16 U.S.C. § 824a-3(d) ..... 2
16 U.S.C. § 824a-3(f) ..... 3
16 U.S.C. § 825*l*(b) ..... 12
18 C.F.R. § 292.101(b)(6) ..... 18
18 C.F.R. § 292.203 ..... 4

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| 18 C.F.R. § 292.204 | 3, 4 |
| 18 C.F.R. § 292.205 | 3 |
| 18 C.F.R. § 292.206 | 3, 4 |
| 18 C.F.R. § 292.206(b) | 5 |
| 18 C.F.R. § 292.207 | 3 |
| 18 C.F.R. § 292.207(a)(1) | 4 |
| 18 C.F.R. § 292.207(a)(2) | 4 |
| 18 C.F.R. § 292.207(b) | 4 |
| 18 C.F.R. § 292.401 | 3 |
| H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 89 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7797 | 12 |
| Sup. Ct. R. 10 | 14 |
| Sup. Ct. R. 15.1 | 10 |
| Sup. Ct. R. 14.5 | 13 |
| D.C. Circuit Rule 14 | 10 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

---

No. 93-332

---

MICHIGAN MUNICIPAL COOPERATIVE GROUP and
THE STATE OF MICHIGAN,
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION and
MIDLAND COGENERATION VENTURE, L.P.,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for District of Columbia Circuit**

---

## RESPONDENT MIDLAND COGENERATION VENTURE'S BRIEF IN OPPOSITION

---

### COUNTERSTATEMENT OF THE CASE

A counterstatement of the case is necessary because the petition repeats as "facts" many assertions that are merely petitioners' own characterizations, rejected below. At issue is a challenge by petitioners Michigan Municipal Cooperative Group ("MMCG") and the State of Michigan to recertifications issued by the Federal Energy Regulatory Commission ("FERC"). FERC found that the cogeneration facility ("the Facility") operated by Midland Cogeneration Venture Limited Partnership ("MCV") is a "qualifying facility" under § 3(18)(B) of the Federal Power Act (FPA), 16 U.S.C. § 796(18)(B) (1988), added by § 201 of the Public Utility Regulatory Policies

Act of 1978 ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117 (1978). A more balanced statement of the regulatory background, the facts concerning the MCV project, and the proceedings below demonstrates the absence of any issue warranting review by the Court.

1. Traditionally, the sale of electricity has been subpect to cost-based rate regulation. With the passage of PURPA, Congress provided that, at the wholesale level, certain "qualifying" cogeneration [1] facilities would be subject to a different regulatory scheme. The purpose of this aspect of PURPA was to encourage the development of "qualifying facilities" ("QFs") by providing market-based incentives for the creation of alternative forms of electric generation. *See generally American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 414-415 (1983); *FERC* v. *Mississippi*, 456 U.S. 742, 746 (1982).

QFs are entitled to sell their power to a traditional electric utility at the utility's "avoided cost"—*i.e.*, the cost at "which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d). In essence, QFs take the business risk that they will be able to generate energy at a cost lower than the utility's "avoided cost." It is MCV's sale of power at the congressionally mandated avoided cost, as opposed to a presumably lower cost-based rate, that gives rise to petitioners' and *amicus* Michigan Municipal League's complaints of "higher rates," Pet. 3, and "windfall profits," Petition ("Pet.") 15; Brief of the Michigan Municipal League as

---

[1] "Cogeneration" facilities are those that make use of heat or steam produced during the generation of electricity instead of allowing the heat or steam to be wasted by dissipation into the environment. *See* 16 U.S.C. § 796(18)(A). In the case of MCV, for example, MCV limited partner Dow Chemical Company makes use of the thermal energy produced by the plant's steam in its production facilities. Appendix to Petition ("Pet. App.") 99a.

*Amicus Curiae* in Support of Petitioners ("MML Br.") at 3.

The avoided cost rate at which a QF can sell power is established by the relevant state regulatory commission. *See* 16 U.S.C. § 824a-3(f); 18 C.F.R. 292.401. In this case, MCV's avoided cost is established by the Michigan Public Service Commission ("MPSC"), the state regulatory body whose authority the petition claims is ignored and undermined by the orders below, Pet. 23. That rate has been affirmed by the Michigan appellate courts. *Consumers Power Co.* v. *Public Service Commission*, 189 Mich. App. 151, 472 N.W.2d 77 (1991), *appeal denied*, 439 Mich. 992, 479 N.W.2d 644 (1992), *amended*, 442 Mich. 909, 503 N.W.2d 446 (1993). This Court has previously explained that the sale of QF power at avoided cost rates, by definition, leaves electric customers at least as well off as they would be in the absence of the sale, and does not increase rates. *American Paper Institute*, 461 U.S. at 415 n.9.

PURPA provides that to be a QF, a cogeneration facility must: (1) meet technical requirements as established in FERC rules, and (2) be "owned by a person not primarily engaged in the generation or sale of electric power." 16 U.S.C. § 796(18)(B). FERC's regulations provide standards by which FERC implements the PURPA ownership requirement. FERC's regulations require that electric utilities may not hold "more than 50 percent of the equity interest in the facility." 18 C.F.R. § 292.206. While petitioners previously advanced a plethora of technical and other challenges to the MCV project, the petition here essentially relates to the requirement that utility equity interest in a QF be less than 50 percent.

The technical and ownership requirements set forth above are the only prerequisites to qualification as a QF. *See* Pet. App. 194-96a; 18 C.F.R. § 292.205-207. The owner or operator of a QF is required to provide FERC with written notice of basic facts concerning the facility

and its operations, but is *not* required to submit information on the percentage of utility ownership in the project. Pet. App. 195a (citing 18 C.F.R. § 292.207(a)(2)). The regulations provide, however, for an *optional* procedure by which a cogeneration project may receive confirmation from FERC that its structure complies with the regulatory requirements. 18 C.F.R. § 292.207(b). This case involves such an optional certification procedure.

FERC has established that an optional QF certification is "in essence a declaratory order, based strictly on the facts presented." Pet. App. 192a. The procedure's "narrow scope" is limited to the facility's satisfaction of the technical and ownership criteria. Pet. App. 193a. As stated in a recent Fourth Circuit decision:

> In prescribing rules for QF certification, the FERC . . . established a set of objective criteria relating to fuel use, size and ownership. 18 C.F.R. §§ 292.203, 292.204, 292.206 (1990). It is thus apparent that a facility which meets these established criteria is automatically eligible for benefits under PURPA. 18 C.F.R. § 292.207(a)(1). Indeed, pursuant to the FERC regulations, the facility was not even required to apply to the agency for certification but could have opted for selfcertification. * * * *Id.* Accordingly, we conclude that the FERC does not have discretion to deny certification to any facility which meets the enumerated criteria and that its certification of this project was therefore merely a ministerial act."

*Sugarloaf Citizens Ass'n* v. *FERC*, 959 F.2d 508, 513 (4th Cir. 1992).

2. The MCV project was created to make productive use of facilities from utility Consumers Power Company's cancelled nuclear power facility in Midland, Michigan. MCV's cogeneration plant makes use of turbine-generators and other assets from the nuclear facility to produce electricity and steam. Pet. App. 8a-9a. In 1987, a Consumers Power subsidiary, CMS Midland, formed the MCV

partnership with other non-utility investors.[2] Under the agreement, MCV would purchase the assets of the nuclear plant for approximately $1.5 billion and use the assets to develop a cogeneration facility.[3]

CMS Midland filed an application with FERC for certification that the project satisfied QF requirements. *See CMS Midland, Inc.*, 38 F.E.R.C. ¶ 61,244 (1987). This application expressly raised two issues emphasized in the petition now before the Court: (1) the method by which the value of the plant assets to be exchanged for what are now known as the "MDC Notes" would be established; and (2) the initial setup of the project while CMS Midland held more than 50 percent of the equity and the timing for the subsequent reduction of this interest below 50 percent. 38 FERC at 61,827-28. Petitioners never intervened in this proceeding to object to either aspect of the MCV project. On March 12, 1987, FERC issued an order granting QF certification effective upon the operation of the facility. *Id.* at 61-829.

Subsequently, several amendments were made to the structure of the MCV project that led to the recertification applications at issue here. The MCV partnership agreement was amended in June 1988 to admit five new non-utility general partners and one non-utility limited partner. Pet. App. 11a. The amendment also reduced CMS Midland's equity interest in the facility to 49 percent. Pet. App. 11a-13a. In May 1989, the agreement

---

[2] In applying the ownership standard, FERC draws no distinction between equity interest held by a utility and equity interest held by a utility's subsidiary, its holding company, or a subsidiary of its holding company. 18 C.F.R. § 292.206(b).

[3] FERC noted that "we cannot ignore the fact that this facility will make productive use of assets intended to be used in a cancelled nuclear unit. Whether the value is between $1.2-$1.5 billion as determined by the non-Consumers Power Partners, or some lesser value, there can be no argument with the fact that the value of these assets is significant. We simply do not see how the waste of these assets can be in the interest of this Nation." Pet. App. 107a.

was further amended so that CMS Midland's allocation of profits, losses, tax, and other benefits in the MCV project was also reduced below 50 percent. *Id.* Under the Commission's procedures, the QF status of a new facility—including the requirement that utility equity ownership be less than 50 percent—is evaluated on the basis of its structure on the date the facility begins operations. Pet. App. 72a. MCV began operating for testing purposes on June 2, 1989. Pet. App. 71a.

The new non-utility partners brought into the MCV project by the amendments placed conditions on their participation. They demanded that the amendments limit the amount to be paid by the partnership for the former nuclear plant assets to the lesser of the original $1.5 billion price of the assets or a negotiated amount that would allow the project to satisfy specified debt coverage ratios and achieve a projected 16 percent rate of return. Pet. App. 15a. The amendments also specifically excluded CMS Midland from the valuation negotiations. *Id.* In August 1989, the non-utility partners agreed with MEC Development Corp. ("MDC"), the Consumers subsidiary to whom the plant assets had been transferred, that MDC would receive approximately $1.2 billion in notes for the assets. Pet. App. 15a-16a.

3. In November 1989, MCV submitted the two optional applications for recertification of QF status that are at issue in the petition. On November 2, 1989, MCV submitted an application for recertification reflecting the changes to the partnership agreement described above, as well as certain technical changes in the plant's operations. Pet. App. 5a. MCV submitted a second recertification application on November 14, seeking confirmation that a proposed sale and leaseback financing arrangement would not alter the project's QF status. Pet. App. 114a.[4]

---

[4] Third-party sale and leaseback financing is a common feature of cogeneration projects, which for tax and other reasons is often critical to securing cogeneration investors. *See generally Puerto*

Petitioners intervened in both recertification proceedings, raising a host of technical, ownership, and other objections to the recertification. They contended that MCV failed to satisfy FERC's "stream of benefits" and "control" tests for evaluating utility ownership percentage in a QF. Petitioners argued that the MDC Notes exchanged for the plant assets should be considered "equity" rather than "debt," Pet. App. 45a, and that the plant assets were overvalued, Pet. App. 46a-48a. They also contended that the establishment of power sales and other contractual arrangements during the time that CMS Midland owned over 50 percent of the project, but prior to the date MCV became operational, should cause FERC to find excessive utility control of the project. Pet. App. 71a.

FERC issued lengthy and comprehensive orders on January 31, 1990 and March 1, 1990 addressing all of petitioners' claims. Pet. App. 5a; Pet. App. 114a. In relevant part, FERC found that MCV satisfied FERC's established ownership criteria for QF status, and its order accordingly granted recertification. Pet. App. 36a. FERC noted that the MCV partnership agreement expressly limited both CMS Midland's voting rights and its share of profits, losses, and surplus to 49 percent. Pet. App. 38a-41a. It found that none of the other aspects of MCV's structure attacked by petitioners altered this fact.

FERC extensively examined the structure of the MDC Notes and their relations in the other financial obligations of MCV, and rejected petitioners' assertion that the MDC Notes should be recharacterized as "equity." Pet. App. 52a-56a. FERC examined the valuation of the assets and concluded that the expected revenue stream valuation method used was both "reasonable" and "typical of the

---

*Rico Electric Power Authority* v. *FERC*, 848 F.2d 243, 248 (D.C. Cir. 1988).

give-and-take of any bargain struck between nonaffiliated parties." Pet. App. 55a.

FERC also rejected petitioners' argument that contractual arrangements put in place while CMS Midland owned over 50 percent of MCV—but *before* the facility became operational—gave Consumers excessive "control" over the facility. Pet. App. 72a. FERC noted that "all of the complained-of transactions preceded the initial operation date when, as we have found, MCV was in compliance with the ownership regulations." *Id.* FERC noted that it is common in cogeneration projects to "have such things as fuel supply and power purchase contracts in place before seeking equity investors as partners." *Id.* The Commission found that the non-utility investors had control of MCV both by virtue of their 51 percent voting power and their ability to control MCV's business dealings. *Id.*

FERC also thoroughly addressed the issues on which petitioners claim the agency "turned its back," Pet. 13. With respect to petitioners' contention that FERC should undertake a broad review of the "competitive implications" of MCV's QF status, FERC noted that matters beyond compliance with PURPA's technical and ownership requirements are outside the established scope of a recertification proceeding. Pet. App. 34a-35a, 87a ("this is not the proper proceeding to address these claims"). FERC also specifically addressed the gas contracts the petition claims it ignored, and concluded that petitioners' argument that the contracts were inconsistent with FERC's precedent was unfounded. Pet. App. 67a, 76a.

Petitioners filed petitions for rehearing challenging FERC's orders. FERC again noted that "a QF certification order is essentially a declaratory order, based strictly on the facts presented," and that the scope of the proceeding is limited to compliance with "the Commission's ownership and technical requirements." Pet. App. 160a. "We reiterate these points here because the Inter-

venors' arguments on rehearing constitute little more than a rehashing of their original arguments in this recertification proceeding." *Id.* FERC denied the rehearing petitions on the same grounds stated in the original orders. Pet. App. 161a.

Petitioners also made several "Supplemental Filings" under various titles, each filed *after* the jurisdictional time limit for rehearing, seeking to provide "additional support . . . for the argument that the MCV facility is owned or controlled by Consumers." Pet. App. 157a. The Supplemental Filings represented an attempt to show excess utility ownership in MCV "through a myriad of subarguments about facility contracts, the worth and nature of facility assets, Consumers' role in the development of the project, relations among CMS Energy subsidiaries, and a hodge-podge of other alleged facts of similar import." Pet. App. 167a. Among the arguments contained in the Supplemental Filings were the contention that FERC was bound to follow findings of the Michigan Public Service Commission, Pet. App. 174a, and that MCV sought to "evade [state] regulation," Pet. App. 171a—arguments now relied upon in the Petition for Certiorari, *see* Pet. 23-25.

FERC rejected the Supplemental Filings, stating: "we . . . have no authority to waive the statutory jurisdictional requirement by extending the time for filing rehearing materials." Pet. App. 163a (citing *Boston Gas Co.* v. FERC, 575 F.2d 975 (1st Cir. 1978); *Columbia Gas Transmission Corp.*, 40 F.E.R.C. ¶ 61,195, 61,655 (1987)). Nonetheless, FERC examined the untimely materials to determine whether, if they were timely, they would provide any basis to alter the recertification decisions. FERC found that they would not. Pet. App. 159a, 189-90a. Many of the arguments were "purely speculative and appear to express no more than the Intervenors' opinions." Pet. App. 174a. In summary, the Commission stated: " 'There must be an end to litigation, and in any

event, these documents either do not show what they purport to show, or are irrelevant to the issues of the proceeding.'" Pet. App. 168a (quoting *Municipal Electric Utilities Ass'n* v. *Power Authority of the State of New York*, 48 FERC ¶ 61,124, *aff'd sub nom. Allegheny Electric Cooperative, Inc.* v. *FERC*, 922 F.2d 73 (2d Cir. 1990), *cert. denied*, 112 S. Ct. 55 (1991)).

Petitioners next appealed to the United States Court of Appeals for the D.C. Circuit. Following extensive briefing and oral judgment, a panel consisting of Chief Judge Edwards, Judge Sentelle, and Judge Henderson unanimously affirmed FERC's orders on March 26, 1993. They did so in an unpublished order pursuant to D.C. Circuit Rule 14, which allows for disposition without full opinion where the case neither "alters, modifies, or significantly clarifies a rule of law," "criticizes or questions existing law," "creates a conflict with another circuit," nor "warrants publication in light of other factors that give it general public interest." Petitioners filed petitions for rehearing and suggestions for rehearing *en banc*. No member of the Court of Appeals requested a poll of the Court, and rehearing was denied on June 2, 1993.

## REASONS FOR DENYING THE WRIT

Petitioners' real complaint is with Congress' decision that public utilities may participate in QFs under PURPA. Petitioners failed, however, to preserve this question below and it is not before the Court. *See* Sup. Ct. R. 15.1. Petitioners are thus left with an attack on FERC's application of its utility ownership standards to the particular facts presented here, which itself depends heavily on improper non-record materials. Reexamination of the substantial evidence and detailed analysis supporting the Court of Appeals' affirmance of FERC's recertification orders is a factbound task that does not warrant certiorari.[5]

[5] MCV renews its contention that petitioners lack the jurisdictional prerequisite of standing to assert their claims. As has been

## I. PETITIONERS' PROCEDURAL DEFAULTS AND RELIANCE UPON UNTIMELY NON-RECORD MATERIALS PRECLUDE A GRANT OF CERTIORARI

Petitioners have failed to preserve the broad attack on *any* utility participation in QFs that animates their claims. Even as to the narrow challenge to FERC's application of its own standards that is properly before the Court, petitioners rely substantially on untimely non-record materials. These procedural problems would make certiorari inappropriate even if a significant legal question were presented.

### A. Petitioners Failed to Preserve Their Challenge to FERC's Regulation Allowing Utility Participation in QFs

In the Court of Appeals, petitioners forthrightly argued that FERC's ownership standard—allowing fifty percent ownership of QFs by utilities—violated Section 201 of PURPA, 16 U.S.C. 796(18)(B), which requires that QFs be "owned by a person not primarily engaged in

---

pointed out in earlier litigation, the MMCG petitioners are engaged in an ongoing campaign of using regulatory proceedings to pressure Consumers Power into selling ownership interests in its transmission system. *See Michigan Public Power Agency* v. *FERC*, 963 F.2d 1574, 1579 (D.C. Cir. 1992) ("As the Commission recognized, the Group really wants an ownership interest in the transmission system. But the Group made no showing that Consumers has any legal obligation to allow its competitors to become its partners."). The Michigan Attorney General participated in MPSC proceedings setting the avoided cost price for MCV power, but was largely unsuccessful in that forum. *See Consumers Power Co.* v. *Public Service Commission*, 189 Mich. App. 151, 472 N.W.2d 77 (1991), *appeal denied*, 439 Mich. 992, 479 N.W.2d 644 (1992), *amended*, 442 Mich. 909, 503 N.W.2d 446 (1993). While petitioners may have a strategic agenda, they lack standing to challenge MCV's recertification because the harm they allege is not directly traceable to the Facility's recertification nor likely to be redressed by the ruling they seek. *See generally Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

the generation or sale of electric power." They contended that *any* degree of utility participation in QFs violates the statute. Petitioners failed, however, to assert this claim in their petitions for rehearing before FERC. (J.A. 1233.1-1369.) This default imposes a strict jurisdictional bar against consideration of this argument on appeal. *Department of Interior* v. *FERC*, 952 F.2d 538, 544 (D.C. Cir. 1992). Moreover, the argument is also barred because petitioners failed to seek judicial review of FERC's rule within 60 days of its promulgation as required by law. *See* 16 U.S.C. § 825*l*(b); *Raton Gas Transmission Co.* v. *FERC*, 852 F.2d 612, 615 (D.C. Cir. 1988).

Petitioners do not directly raise the basic issue of utility participation in QFs here. Nonetheless, the petition contains numerous references suggesting that it raises issues concerning the proper contruction of PURPA. *See* Pet. 13 ("permitting electric utilities to own qualifying facilities under PURPA . . . undercuts both federal and state electric rate regulation"), 14 ("PURPA prohibits utility ownership of QFs."), 16 ("statutory language would support, if not mandate, a more restrictive standard"). Because of petitioners' failure to preserve the issue, no such question is before the Court. Petitioners' opaque references should not obscure the fact that the only question presented involves FERC's *application* of the standards established in its own regulations and decisions to the specific facts presented.[6]

---

[6] Even if a challenge to the validity of FERC's regulation were before the Court, it would raise no substantial issue. PURPA allows utility participation in QFs. *See* H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 89 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7797 ("Electric utilities may participate in an entity which owns [qualifying] facilities with other persons and such entity could qualify under these definitions. The test of this case is whether the entity which owns the facility is primarily engaged in [utility activities] . . . .").

### B. The Petition Relies Upon Arguments and Factual Assertions that Were Excluded Due to Violation of a Jurisdictional Time Limit

Throughout the petition, heavy reliance is placed on arguments and materials that were first presented in the Supplemental Filings rejected by FERC as jurisdictionally out of time.[7] This material is not properly part of the record before the Court. Because the petition involves no challenge to FERC's exclusion of this material as untimely, petitioners' citations to the material are improper. The petition's failure to disclose this defect in the record is in itself a sufficient reason for denial of certiorari. *See* Sup. Ct. R. 14.5.

Two of petitioners' arguments in favor of certiorari are based almost exclusively on the untimely Supplemental Filings. Ten of the twelve J.A. citations in petitioners' allegation at pages 5-6 that the plant assets were overvalued are to untimely non-record material. *See* Pet. 5 (citations to J.A. 1969, 1923, 1929, 1932, 1935-43, 1944, 1947, 1948, 1963-69; R. 3822.QQ-3822.TT). *Every* record citation in petitioners' argument that FERC failed to accord proper weight to findings of the MPSC is to untimely non-record material. *See* Pet. 11-12 & n. 14 (citations to J.A. 1375-76, 1379, 1372, 2066-71, 1376, 1477-79); Pet. 23-25 (citations to J.A. 1372, 1375-76, 1379, 2066-71, 2070). Indeed, the argument concerning the MPSC opinions was itself part of the untimely Supplemental Findings. *See* Pet. App. 174a.

Petitioners rely on further citations to untimely arguments and material throughout their petition. *See, e.g.*, Pet. 5 (description of MCV contracts, citing J.A. 1481-83, 1481-82 [sic]); Pet. 6 (management and control of MCV,

---

[7] The following material was presented by petitioners only in their untimely Supplemental Filings: Record pages (cited in the petition as "R.") 2307-2462, 2477-2545, 2550-3254, 3262-3822, 3823-3838, and 3843-3851; Joint Appendix pages (cited in the petition as "J.A.") 1372-1406, 1407-1483, 1484-2064, 2065, 2066-71.

citing J.A. 1374-79); Pet. 20 (negotiation of contracts, citing J.A. 1532); FERC official's attendance at ribbon-cutting ceremony, citing J.A. 1404-06); Pet. 26 (rate differential caused by PURPA avoided cost standard, citing J.A. 1920-73). Even if significant legal issues were presented, this case would be an inappropriate candidate for certiorari.

## II. THE COURT OF APPEALS' AFFIRMANCE OF FERC'S APPLICATION OF ITS REGULATORY STANDARDS TO PARTICULAR FACTS PRESENTS NO ISSUE MERITING REVIEW

The petition ultimately involves run-of-the-mill complaints about FERC's application of its own established recertification procedures and precedents to particular facts. Petitioners' alarms of "profound issues of federalism and comity," Pet. 14, with economic consequences on a par with "the stock market crash in 1929," Pet. 30, are the same brand of strident mischaracterization that FERC and the D.C. Circuit rejected. The routine review of an agency decision presented here is not a matter for the Court's certiorari jurisdiction. *See, e.g., Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

### A. The Orders Below Represent the Application of Established Standards to a Particular Record, Amply Supported by Substantial Evidence

The petition merely presents the same factual arguments that petitioners unsuccessfully presented to FERC and the Court of Appeals. In its attack on evaluation of the "stream of benefits" and "control" issues in the orders below, petitioners do not present any clear issue of law, nor do they contend that the Court of Appeals' affirmance creates a conflict of authority. *Cf.* Sup. Ct. R. 10. FERC aptly described the nature of this dispute in rejecting petitioners' contention that its decision would encourage utilities to convert plants into QFs and avoid regulation:

"QF certifications are fact-based and hence must be decided on a case-by-case basis." Pet. App. 173a. This is what was done below.

In evaluating utility ownership interest in MCV, FERC followed its established precedents. As it has consistently done in the past, FERC examined the partnership structure based on its "stream of benefits" and "control" tests. *See* Pet. App. 45a, 69a; *Dominion Resources, Inc.*, 43 F.E.R.C. ¶ 61,079 at 61,250-51 (1988); *KP Diversified Investors, Inc.*, 32 F.E.R.C. ¶ 61,013 at 61,050 (1985); *Ultrapower 3*, 27 F.E.R.C. ¶ 61,094 at 61,184 (1984). While the petition claims that FERC "abandoned its ownership test" in recertifying MCV, Pet. 16, FERC cited and discussed the same precedents petitioners claim it abandoned.

As described above, FERC thoroughly addressed petitioners' claims concerning the "stream of benefits" with respect to asset valuation and found the anticipated revenue valuation method reasonable. Pet. App. 55a. FERC also examined petitioners' "control" arguments relating to the facility's contracts, finding that MCV was in compliance with ownership requirements as of its operational date, and that the non-utility partners continued to exercise majority control. Pet. App. 72a. FERC addressed each of the other factual objections relied upon in the petition. Petitioners' disappointment that FERC found their assertions to be unsupported, speculative, or irrelevant to the certification process provides no basis for the Court's intervention.

### B. None of Petitioners' Various Other Complaints About the Proceedings Below Warrants the Court's Review

Petitioners' various additional objections concerning FERC's procedures do not warrant review. First, as discussed above, the contention that FERC was required to follow rulings of the MPSC is not properly before the

Court because of its untimely presentation below. In any event, FERC was manifestly correct in holding that it was not bound by MPSC decisions. The MPSC did not address or decide any qualifying facility certification issue under PURPA, over which FERC has exclusive jurisdiction. *See* Pet. App. 175a. Petitioners' suggestion that *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986), requires FERC deference to the MPSC is without merit. *Elliott* dealt with prior determinations under particular civil rights statutes, and did not involve any administrative agency, much less FERC or PURPA.[8]

Petitioners' contention that FERC was required to grant discovery and a hearing is similarly unfounded. PURPA does not require hearings regarding determinations of QF status. *See* 16 U.S.C. § 796(18)(B)(i). This Court has previously rejected the argument that FERC decisions on PURPA issues require formal evidentiary hearings in the context of the statute's interconnection proceedings. *See American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 420 (1983) (recognizing that burdening the process with hearings would "seriously impede the very development of cogeneration . . . Congress sought to facilitate"). FERC's use of declaratory orders as opposed to evidentiary hearings is a longstanding practice that advances Congress' goal of minimizing

[8] As for the so-called "profound issues of federalism" presented by this issue, Pet. 14, petitioners beg the only question really presented—whether MCV meets FERC's certification standards for QFs. If, as FERC and the D.C. Circuit found, it does, MCV's entitlement to the benefits of PURPA simply reflects the decision of Congress. To say that PURPA's avoided cost provisions might override a contrary policy preference of a state utility commission is merely to point out the constitutionally obvious. *See* U.S. Const., Art. VI, cl. 2 (Supremacy Clause). In any event, the MPSC itself has issued an order *encouraging* utility ownership of QFs. MPSC, *Final Order in the Proceedings to Implement Provisions Set Forth in Title II, Section 210, of the Public Utility Regulatory Policies Act (PURPA) of 1978 re Cogeneration and Small Power Production*, No. U-6798, 48 P.U.R.4th 465 (Aug. 27, 1982).

the regulatory burdens on cogeneration entities seeking QF status. *See, e.g., Sithe/Independence Power Partners, L.P.*, 61 F.E.R.C. ¶ 61,212 (1992); *Cogentrix of Mayaguez, Inc.*, 59 F.E.R.C. ¶ 61,392 at 62,494 (1992); *Wyoming Wind Power, Inc.*, 34 F.E.R.C. ¶ 61,152 at 61,261 (1986).[9]

Because PURPA does not require hearings, FERC has broad discretion in formulating its certification procedures. *See, e.g., Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544-46 (1978). The Court of Appeals affirmance of FERC's orders on the record it reviewed is entirely consistent with that court's precedents. *See, e.g., Louisiana Ass'n of Independent Producers and Royalty Owners* v. *FERC*, 958 F.2d 1101, 1113-15 (D.C. Cir. 1992) (no hearing needed where questions can be adequately resolved on written record); *Woolen Mills Assoc.* v. *FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990) (court uses "abuse of discretion" test to review FERC's decision not to hold a hearing). Petitioners' suggestion that the particular facts here call for an exception to FERC's normal procedure provides no basis for certiorari.

FERC also properly rejected petitioners' demands that it consider competitive effects, rate impact, and a smorgasbord of other matters outside the proper scope of a recertification proceeding, *see* Pet. 22-23, which is limited to compliance with PURPA's technical and ownership requirements, Pet. App. 34a-35a, 87a. Petitioners' claims about "excessive rates" are nothing more than an invitation to revisit choices that Congress made in allowing utilities to participate in PURPA's QF provisions, includ-

---

[9] Petitioners' citation to *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111 (1962), as contrary to FERC's use of declaratory order procedures in the PURPA certification process, is woefully off point. The case had nothing to do with PURPA, with FERC, or with any agency procedure similar to FERC's certification procedure.

ing the sale of power at avoided cost.[10] Petitioners' arguments concerning MCV's rates and the undermining of state regulation are particularly ironic in light of the fact that it is the MPSC that sets the avoided cost rate that MCV may charge. *See* 18 C.F.R. § 292.101(b)(6).

Finally, the hyperbolic contentions of petitioners and their *amicus* that the orders below will increase electricity costs throughout the Nation, Pet. 25, MML Br. 6, undermine state utility regulation, *id.*, and imperil the financial health of the Nation's utilities, Pet. 13, are further makeweight arguments that beg the question of MCV's compliance with FERC's regulations. If, as FERC found, MCV complies with the agency's regulations for QFs, then MCV is entitled to the benefits Congress chose to bestow on QFs in PURPA. This Court has already addressed and rejected the central thrust of petitioners' claim—that decisions under PURPA should be subject to principles of cost-based rate regulation under the Federal Power Act. *See American Paper Institute*, 461 U.S. at 414 ("Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities to utilities"). To the extent electric rates under the PURPA scheme (as reviewed by the MPSC) differ from those petitioners would prefer, their proper forum is Congress.

---

[10] As the Commission put it: "The fact that qualifying status will relieve the facility of regulation that Consumers Power might otherwise face were it a part of the utility's rate base is irrelevant. That is a benefit conferred on such facilities by section 210 of PURPA." Pet. App. 69a, 171a.

## CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

ARNOLD H. QUINT
LAURA M. WILSON
HUNTON & WILLIAMS
P.O. Box 19230
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 955-1500

THOMAS G. SLATER, JR.*
R. HEWITT PATE
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

* Counsel of Record

November 1, 1993